

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

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Amendment of Rules Governing  
Procedures to be Followed When  
Formal Complaints are Filed Against  
Common Carriers

CC Docket 96-238

Comments of RCN Telecom Services, Inc.  
Regarding Accelerated Docket for Complaint Proceedings

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**Comments of RCN Telecom Services, Inc.  
Regarding Accelerated Docket for Complaint Proceedings**

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RCN Telecom Services, Inc. ("RCN"), by its undersigned counsel, respectfully submits the following comments in response to the Commission's Public Notice seeking Comments Regarding Accelerated Docket for Complaint Proceedings (rel. Dec. 12, 1997) in the above-captioned proceeding.

**Introduction and Summary**

In *Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report & Order, CC Docket No. 96-238, FCC 97-396 (rel. Nov. 25, 1997)(the "Complaint R&O"), the Commission promulgated streamlined rules for handling resolution of formal complaints. The Commission recognized that some disputes might be resolved most efficiently and fairly using an alternative form of complaint adjudication that incorporated a hearing with live witnesses. *Complaint R & O*, ¶ 5. RCN supports the Commission's efforts to improve the speed and efficiency of the complaint process by

establishing an Accelerated Docket and Minutials as an alternative to the normal process for resolution of formal complaints.

## **COMMENTS**

### **I. Need For Accelerated Docket.**

RCN supports the creation of an Accelerated Docket with a hearing-type adjudication process. An Accelerated Docket will foster competition by permitting parties to resolve interconnection and competition disputes quickly. As a new competitor in the local and long distance telecommunications markets, RCN encounters barriers to competition on a daily basis. Many of the problems that RCN faces require immediate practical resolutions.

For example, RCN is attempting to collocate physically throughout the northeastern United States. Despite approved interconnection agreements that mandate physical collocation in most cases, RCN's requests for physical collocation are met with competitive barriers great and small. Among other barriers facing RCN, space designated for collocation is unsuitable; estimates for building out suitable space are exorbitant; and RCN employees are not permitted to use existing restroom facilities without an escort and entrances to buildings. Each delay caused by the imposition of unreasonable and, in many cases, ridiculous restrictions on physical collocation drives up RCN's costs and impedes competition.

There is currently no swift and reliable method for resolving these and myriad other disputes. Current methods are either too lengthy or do not permit the development of an adequate factual record for resolution of the issues. The Accelerated Docket proposed by the Commission resolve both of these problems.

## **II. Minitrials**

RCN urges the Commission to adopt minitrials as an integral part of the Accelerated Docket. RCN agrees that minitrials permit closer inquiry into the factual issues and more effective credibility determinations than a paper record. Many of the issues that new entrants face are very fact specific and technical, and often cannot be adequately elucidated in briefs and affidavits. The presence of live witnesses gives the Commission staff the opportunity to question witnesses on key issues. It also gives the parties an opportunity to clarify and narrow the issues in dispute.

The goals of providing rapid and fair resolution of disputes will be undermined if minitrials are not subject to some time limitations. Therefore, RCN supports the suggestion that each side be given an equal amount of time within which to present its case and to cross-examine its opponent's witnesses. The parties should be required to confer before the hearing and estimate the amount of time required for direct and cross examination of witnesses.

One possible method of expediting the hearing is to allow parties to pre-file direct testimony. Cross-examination would occur at the hearing. Pre-filing testimony has the advantage that the opposing party has notice of the scope of direct examination and can target cross-examination. This will result in more expedient minitrials.

## **III. Discovery**

Under the new procedures adopted by the Commission, parties are permitted to serve a limited number of interrogatories and the Commission "will be inclined to grant all reasonable requests" for additional discovery including document production and depositions. *Complaint*

*R&O*, ¶ 116. Although this procedure is viable for the formal complaint process, it would effectively limit discovery in the Accelerated Docket to interrogatories only.

Therefore, RCN urges the Commission to require parties to exchange relevant documents and the names and addresses of any person with knowledge about the disputed issues at the time initial pleadings are filed. RCN also supports a rule requiring submission of discovery requests and disputes to the Task Force at the initial status conference so that the Task Force can issue its decisions at that conference or immediately thereafter. These two proposals would maximize staff control over the discovery process by limiting opportunities for abuse.

Early initial disclosure of relevant documents and persons with knowledge about the disputed issues is critical given the short time frame. Requiring submission of relevant documents and the identities of persons with knowledge at the time initial pleadings are filed is not unduly burdensome. As the Commission noted in the Complaint *R&O*, “fact pleading requires that a complainant know the specific facts necessary to prove its claim at the time of filing.” *Complaint R&O*, ¶ 120. Accordingly, a complainant should be able to identify readily relevant documents and key witnesses at the time the complaint is filed. Moreover, the requirement that parties engage in mandatory pre-filing settlement discussions eliminates any unfairness to a defendant because by the time the complaint is filed, the defendant will be on notice of the claim against it.

RCN opposes the suggestion that initial disclosure of documents be limited to those “likely to bear significantly on any claim or defense.” All relevant documents should be disclosed. Any limitation beyond relevance permits parties to self-censor discovery. This is particularly troublesome because in many cases the defendant carrier has sole possession and

control of critical information. Moreover, identification and production of relevant documents is not significantly more burdensome than identification and production of a more limited universe of documents. As the Commission observed, “[i]n most cases, parties to formal complaints before the Commission are sophisticated business entities who fully understand the issues before them and which documents in their possession or control are relevant to those issues.”

*Complaint R&O*, ¶ 85.

RCN also urges the Commission to require that discovery requests and disputes be submitted to the Task Force at the initial status conference. The parties must engage in a “meet and confer” conference prior to the initial status conference. *Complaint R&O*, ¶ 145. If early voluntary disclosures are required, discovery disputes and the need for additional discovery should be ripe for consideration at the initial status conference. However, given the abbreviated time frame, it is not feasible for the parties to brief the discovery issues prior to the initial status conference. RCN suggests that the Commission require that each party submit a letter brief of not more than five pages describing the dispute, the party’s position and suggesting a possible resolution. This letter brief would be submitted at the initial status conference.

The Accelerated Docket requires voluntary compliance with initial disclosure requirements and adherence to determinations regarding discovery disputes. Failure to comply with basic discovery rules will jeopardize the functioning of the Accelerated Docket. Therefore, sanctions for failure to comply should be strict.

As the Commission noted in the Complaint R&O, it has the fully panoply of sanctions at its disposal for violations or abuses of the formal complaint rules. *Complaint R&O*, ¶ 278. The Commission should retain the flexibility to determine which sanctions are appropriate for

discovery violations. However, given the need to encourage early and full compliance with discovery orders, RCN urges the Commission to adopt a rule that all violations of discovery orders or rules will be sanctioned unless the violating party can show cause why it should be not sanctioned. This presumption in favor of imposing sanctions will encourage parties to comply with discovery orders without unfairly punishing parties for justifiable violations of the rules.<sup>1</sup>

#### **IV. Pre-Filing Procedures**

Although RCN enthusiastically supports the Commission's requirement that parties engage in pre-filing settlement discussions, it does not support the additional suggestion that these discussions take place under the auspices of the Task Force as a pre-condition to acceptance onto the Accelerated Docket. The expedited time frame and early disclosure requirements are strong incentives for parties to engage in pre-filing settlement discussions. Moreover, RCN doubts that Task Force intervention at the pre-filing stage will facilitate resolution of disputes in many cases. Voluntary pre-filing discussions with the Task Force will, of course, remain an available option in those cases where they appear likely to facilitate settlement.

#### **V. Pleading Requirements**

RCN acknowledges that the new pleading requirements require greater diligence by the parties presenting claims. The heightened pleading requirements coupled with abbreviated time frame will put pressure on defendants who are attempting to answer and comply with initial

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<sup>1</sup> RCN believes that there will be few instances in which violations of discovery orders are justifiable. However, a bright-line rule mandating sanctions in all cases would unfairly punish the few justified failures to comply and hamstring the Commission's exercise of its discretion to impose sanctions.



disclosure requirements within seven calendar days. The Accelerated Docket, however, requires that both parties are prepared to move forward quickly at every stage and requires early disclosure of claims and the factual bases supporting those claims. It is simply not practical to permit defendants to meet lower standards in initial pleadings. Therefore, RCN urges adoption of a rule that the answer is due ten (10) calendar days after service of the complaint. Although either the seven-day or the ten-day time period is short, by the time the parties reach the complaint stage settlement talks should have narrowed the number and scope of the issues in dispute. These discussions will have put the defendant on notice about the basis of the claims against it.

#### **VI. Status Conferences**

The initial status conference will be effective only if the parties have discussed and identified disputed issues of fact, key legal issues and discovery disputes. However, under the Accelerated Docket, it will be impossible for the parties to discuss these issues and prepare a written report prior to the initial status conference.

RCN suggests that the parties be required to meet and confer prior to the initial status conference. During the meet and confer conference, the parties should be required to discuss only (1) discovery; (2) stipulated facts, disputed facts and key legal issues; and (3) settlement prospects. Each of the parties should be required to prepare a brief statement of its position on disputed factual and legal issues for submission at the initial status conference in addition to the letter brief on discovery disputes described above. *Infra*, at III. The parties should prepare a joint statement for submission at the initial status conference encompassing only stipulated facts and key legal issues. Since the Task Force will not receive the submissions until the initial status

conference -- not before as required under the formal complaint resolution rules -- the Task Force should be given two calendar days to issue any necessary rulings on discovery or other disputed issues.

RCN believes that the Task Force must maintain tight control on the scheduling of matters on the Accelerated Docket. Therefore, it does not believe that parties should discuss or agree to any schedule independent from that imposed by the Task Force at the initial status conference. RCN suggests that any schedule adopted by the Task Force require that the parties exchange witness lists, pre-filed testimony and documents upon which the party intends to rely at the minitrial at least three (3) calendar days prior to the minitrial to give the opposing party sufficient time to prepare. Any post-hearing briefing schedule must require concurrent submission of initial briefs. There should be no right to file reply briefs.

## **VII. Damages**

RCN urges the Commission to limit the Accelerated Docket to bifurcated liability claims with damages claims to be handled separately under procedures set out in the Complaint R&O. Although this has the result that a complainant can defeat a defendant's request for assignment to the Accelerated Docket by refusing to bifurcate liability and damages, the Accelerated Docket will function only if both parties are committed to the process. Moreover, damages discovery and calculations are often complex and require expert testimony. It will simply not be feasible to conduct that discovery and resolve complicated damages issues within the 60-day time period.

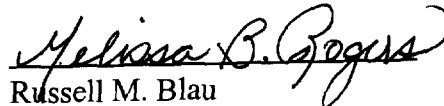
Further, it is RCN's experience that the most pressing need in interconnection disputes is for prospective relief, rather than damages. It is far more critical to an operating CLEC to remove barriers to ongoing competition than to obtain compensation for past injuries. Damages

can always be addressed at a later date in appropriate cases, but it is impossible to go back later and regain business opportunities that were lost due to delays in resolving interconnection disputes.

### **CONCLUSION**

RCN is enthusiastic about the Task Force's creation and implementation of an Accelerated Docket. As competition heats up in the telecommunications market, disputes are growing geometrically. Competition can be nurtured only if there is a rapid and reliable vehicle for adjudicating those disputes. RCN believes that the Accelerated Docket can be that vehicle.

Respectfully submitted,



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